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HENG POH KEAN v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
AHMADI ASNAWI JCA
KAMARDIN HASHIM JCA

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[CRIMINAL APPEALS NO: W-05(M)-442-12-2016, W-05(M)-444-12-2016 & W-05(M)-446-12-2016]
19 DECEMBER 2018

C

CRIMINAL PROCEDURE: *Prosecution – Gap in evidence – Entrapment set up by police based on information on drug sale transaction by informer – Dealings communicated between agent provocateur and accused persons through informer – Whether informer played significant role – Whether essential witness to unfolding of events – Whether failure to call informer caused serious gap in prosecution's case – Whether raised reasonable doubt in prosecution's case*

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CRIMINAL PROCEDURE: *Witness – Informer – Entrapment set up by police based on information on drug sale transaction by informer – Dealings communicated between agent provocateur and accused persons through informer – Whether informer played significant role – Whether essential witness to unfolding of events – Whether informer assumed mantle of agent provocateur – Whether failure to call informer caused serious gap in prosecution's case – Whether adverse inference ought to be invoked against prosecution – Evidence Act 1950, s. 114(g)*

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EVIDENCE: *Exhibit – Identity of exhibits – Entrapment set up by police based on information on drug sale transaction by informer – Ecstasy pills – Discrepancies between evidence of raiding and investigating officer and evidence of chemist – Whether exhibits wrongly identified – Whether absence of reasonable explanation raised reasonable doubt in identity of drugs – Whether prima facie case established*

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The police agent provocateurs, acting as drug buyers, conducted an entrapment based on information obtained by SP5 from his informer, whose identity remained unknown during the trial. Upon receiving information on a drug transaction involving the purchase of 5000 'ecstasy pills', SP5 conveyed the information to his superior, SP4. SP4 then instructed SP5 and SP7 to act as the buyers and to proceed with the transaction, according to the arrangement made by the informer. By the time SP5 and SP7 reached the meeting place, SP4 and members of his team were already there, taking their ambush positions. After waiting in the car for about 15 minutes, the third appellant came and entered into the car. He requested to see the money but SP5 demanded to see the 'ecstasy pills' first. The third appellant left the car and came back later with the first appellant and entered the car. The first appellant demanded to see the money and SP5 duly gave him the money. After counting the money, the first appellant made a phone call and the

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second appellant came shortly thereafter, carrying with him a plastic package which he passed to the third appellant who, in turn, passed it to the first appellant. The first appellant opened the plastic package, revealing the 'ecstasy pills', upon which SP5 gave the ambush signal and the ambush team led by SP4 sprang into action. The second appellant tried to flee the scene but was apprehended, whilst the first and third appellants were detained while still inside the car. The plastic package, containing a total of 5000 'ecstasy pills', was seized from the first appellant. Upon analysis, the 'ecstasy pills' were found to contain a total of 540.3g of 3, 4-methylenedioxymethamphetamine (MDMA), a drug listed under the First Schedule of the Dangerous Drugs Act 1952 ('DDA'), which formed the basis of the charge against all the appellants ('the drugs'). The three appellants were thus charged and tried together at the High Court for drug trafficking under s. 39B(1)(a) of the DDA. At the end of the prosecution's case, the trial judge ruled that a *prima facie* case of direct trafficking by an overt act of 'selling', as provided under s. 2 of the DDA, had been proven against the appellants. At the end of the defence case, having found that the defence had failed to raise any reasonable doubt against the prosecution's case, the appellants were convicted as charged and accordingly, sentenced to death. Hence, this appeal. The grounds of appeal were confined to: (i) the role of the informer; and (ii) the doubt in the identity of the drugs.

Held (allowing appeal)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The informer had played a significant role in the sale transaction and should be considered as a person who held 'the key to the unfolding of events, without which there were gaps in the prosecution's case' and played the 'deciding factor in the sale transaction of the drugs'. The evidence revealed that it was the informer who had actually communicated with the seller and determined the price and amount of the 'estasy pills' and the time and place of the sale transaction that is to take place and had it conveyed to SP5. SP5 then conveyed the information to SP4 who made the decision to proceed with the sale transaction that finally resulted in the arrest of the appellants. The investigating officer, SP8, confirmed that there was never a direct communication between SP5 and SP7 with any of the appellants. In such circumstances, the informer had assumed the mantle or role of an agent provocateur and thus had become an essential witness for the unfolding of the full narrative of the prosecution's case, without which, there was a serious gap in the prosecution's case. (paras 21-23)

(2) The prosecution should not be adjudged to have deliberately made an attempt to suppress the evidence of the informer simply by its failure to call or offer the informer as a witness. Thus, the adverse presumption under s. 114(g) of the Evidence Act 1950 should not apply against the

prosecution. Nevertheless, the failure by the prosecution to call the informer had created a material gap in its case and consequently, raised a reasonable doubt as to whether the appellants had knowledge that they were consciously and deliberately participating in a sale transaction of drugs, since all the matters and information regarding the sale transaction were obtained by SP5 from the informer and there was never any direct communication between SP5 and the appellants. Therefore, it could not be said that a *prima facie* case had been established against all the three appellants as charged and thus, the defence should not have been called by the trial judge. (paras 24 & 25)

(3) The evidence of SP4 and SP8 showed that 3,500 of the pink-colored pills had '$' symbol embossed on them whereas the evidence of the chemist showed that out of the 3,500 pink-colored pills, 1,500 of them had a 'Crown' symbol on them and not a '$' symbol. There was no explanation provided by both SP4 and SP8 as to why there were discrepancies in the identification of the 3,500 pills. It involved a big amount of pills that were wrongly identified and thus, in the absence of a reasonable explanation, the trial judge could not simply brush it aside as immaterial and of no consequence. The onus was on the prosecution to offer cogent explanation to rectify the discrepancies and the failure to do so would raise a reasonable doubt in the identity of the drugs. (paras 29 & 32)

(4) In the circumstances, the prosecution had failed to prove a *prima facie* case against all the three appellants and their defence should not have been called. The appeal was therefore allowed and the convictions and sentences handed down by the trial judge was set aside. All the three appellants were acquitted and discharged of the charge against them. (para 33)

Bahasa Malaysia *Headnotes*

Ejen-ejen perangkap, menyamar sebagai pembeli-pembeli dadah, menjalankan satu pemerangkapan berdasarkan maklumat yang diperoleh SP5 daripada sumbernya, yang identitinya masih belum diketahui semasa perbicaraan. Selepas menerima maklumat tentang transaksi dadah melibatkan pembelian 5000 'pil ekstasi', SP5 menyampaikan maklumat itu kepada pegawai atasannya, SP4. SP4 kemudian mengarahkan SP5 dan SP7 menyamar sebagai pembeli-pembeli dan meneruskan dengan transaksi itu menurut pengaturan yang dibuat oleh sumber. Semasa SP5 dan SP7 tiba di tempat pertemuan, SP4 dan ahli pasukannya telah pun tiba, bersedia untuk menyerang hendap. Selepas menunggu di dalam kereta kira-kira 15 minit, perayu ketiga sampai dan masuk ke dalam kereta. Dia meminta melihat wang tetapi SP5 meminta melihat 'pil ekstasi' terlebih dahulu. Perayu ketiga

keluar dari kereta dan kembali selepas beberapa lama dengan perayu pertama dan masuk ke dalam kereta. Perayu pertama menuntut melihat wang dan SP5 akur lalu memberi kepadanya wang tersebut. Selepas mengira wang itu, perayu pertama membuat panggilan telefon dan perayu kedua tiba sejurus kemudian, membawa bersama-samanya satu bungkusan plastik yang diberi kepada perayu ketiga yang seterusnya memberi bungkusan itu kepada perayu pertama. Perayu pertama membuka bungkusan plastik, mendedahkan 'pil ekstasi', dan ketika itu, SP5 memberi isyarat untuk menyerang dan pasukan serangan hendap diketuai SP4 segera bertindak. Perayu kedua cuba melarikan diri dari tempat kejadian tetapi berjaya ditangkap, manakala perayu pertama dan ketiga ditahan semasa masih di dalam kereta. Bungkusan plastik mengandungi sejumlah 5000 'pil ekstasi' dirampas daripada perayu pertama. Setelah dianalisis, 'pil-pil ekstasi' tersebut didapati mengandungi sejumlah 540.3g 3, 4-methylenedioxymethamphetamine (MDMA), dadah yang tersenarai bawah Jadual Pertama Akta Dadah Berbahaya 1952 ('ADB'), yang membentuk asas pertuduhan terhadap kesemua perayu ('dadah-dadah itu'). Ketiga-tiga perayu, dengan itu, dipertuduh dan dibicarakan bersama-sama di Mahkamah Tinggi untuk pengedaran dadah bawah s. 39B(1)(a) ADB. Di akhir kes pendakwaan, hakim bicara memutuskan kes *prima facie* pengedaran langsung melalui tindakan terang-terangan 'menjual' yang diperuntukkan bawah s. 2 ADB telah dibuktikan terhadap perayu-perayu. Di akhir kes pembelaan, selepas mendapati pihak pembelaan gagal membangkitkan apa-apa keraguan munasabah terhadap kes pendakwaan, perayu-perayu disabitkan seperti yang dipertuduh dan dijatuhkan hukuman mati sewajarnya. Oleh itu, rayuan ini. Alasan-alasan rayuan dihadkan pada: (i) peranan sumber; dan (ii) keraguan dalam identiti dadah.

Diputuskan (membenarkan rayuan)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Sumber memainkan peranan penting dalam transaksi jualan dan perlu dipertimbangkan sebagai seorang yang menjadi 'kunci pada penguraian kejadian, dan tanpanya wujud lompang dalam kes pendakwaan' dan menjadi 'faktor penentu dalam transaksi jualan dadah-dadah tersebut'. Keterangan mendedahkan bahawa sumber adalah orang yang sebenarnya berkomunikasi dengan penjual dan menentukan harga dan jumlah 'pil-pil ekstasi' dan masa dan tempat transaksi jualan akan berlaku dan menyampaikannya kepada SP5. SP5 kemudian menyampaikan maklumat itu kepada SP4 yang membuat keputusan untuk meneruskan dengan transaksi jualan itu yang akhirnya menjurus pada penangkapan perayu-perayu. Pegawai penyiasat, SP8, mengesahkan bahawa tiada komunikasi secara langsung antara SP5 dan SP7 dengan mana-mana perayu. Dalam keadaan itu, sumber memainkan peranan sebagai ejen penyamar dan oleh itu, menjadi saksi penting dalam penguraian naratif penuh kes pendakwaan, dan tanpanya, wujud kelompangan serius dalam kes pendakwaan.

(2) Pihak pendakwaan tidak sepatutnya dihakimi sebagai sengaja mencuba menyembunyikan keterangan sumber semata-mata atas kegagalan memanggil atau menawarkan sumber sebagai saksi. Oleh itu, anggapan bertentangan bawah s. 114(g) Akta Keterangan 1950 tidak diguna pakai terhadap pendakwaan. Walau bagaimanapun, kegagalan pihak pendakwaan memanggil sumber membentuk lompang penting dalam kesnya dan dengan itu, membangkitkan keraguan munasabah sama ada perayu-perayu mempunyai pengetahuan bahawa mereka dengan kesedaran dan sengaja terlibat dalam transaksi jualan dadah-dadah tersebut, oleh sebab kesemua perkara dan maklumat berkaitan transaksi jualan diperoleh SP5 daripada sumber dan tiada apa-apa komunikasi langsung antara SP5 dan perayu-perayu. Oleh itu, tidak boleh dikatakan kes *prima facie* telah dibuktikan terhadap ketiga-tiga perayu seperti yang dipertuduh dan dengan itu, pembelaan diri tidak sepatutnya dipanggil oleh hakim bicara.

(3) Keterangan SP4 dan SP8 menunjukkan bahawa 3,500 pil-pil berwarna merah jambu mempunyai simbol '$' terukir padanya manakala, keterangan ahli kimia menunjukkan daripada 3,500 pil-pil merah jambu itu, 1,500 mempunyai simbol 'Crown' padanya dan bukan simbol '$'. Tiada penjelasan diberi oleh SP4 dan SP8 tentang mengapa terdapat percanggahan dalam mengenal pasti 3,500 pil itu. Ini melibatkan sejumlah besar pil yang dikenal pasti secara salah dan oleh itu, tanpa penjelasan munasabah, hakim bicara tidak boleh mengetepikannya dengan sewenang-wenangnya sebagai tidak penting. Beban adalah atas pihak pendakwaan untuk menawarkan penjelasan yang meyakinkan untuk membetulkan percanggahan dan kegagalan berbuat demikian membangkitkan keraguan munasabah terhadap identiti dadah-dadah tersebut.

(4) Dalam hal keadaan tersebut, pihak pendakwaan gagal membuktikan kes *prima facie* terhadap ketiga-tiga perayu dan mereka tidak sepatutnya dipanggil membela diri. Oleh itu, rayuan ini dibenarkan dan sabitan-sabitan dan hukuman-hukuman yang dikenakan oleh hakim bicara diketepikan. Ketiga-tiga perayu dilepaskan dan dibebaskan daripada pertuduhan terhadap mereka.

Case(s) referred to:
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), 40
Evidence Act 1950, s. 114(g)

For the 1st appellant - Kitson Foong, Chew Jee San & Poh Yi Tying; M/s Kit & Assocs
For the 2nd appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the 3rd appellant - Hazman Ahmad; M/s Omar Ismail Hazman & Co
For the respondent - Mohd Zain Ibrahim; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Heng Poh Kean & Yang Lain [2016] 1 LNS 1656 (overruled).]

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi JCA:

[1] The three appellants were charged and tried together at the High Court of Kuala Lumpur for drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). The charge against them read as follows:

> Bahawa kamu bersama-sama pada 22.1.2014 jam lebih kurang 9.30 malam di hadapan Kelab Connaught, Jalan 9, Taman Bukit Cheras, di dalam daerah Cheras di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 540.3 gram dadah 3, 4 – Methylenedioxymethamphetamine (MDMA). Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama serta di baca bersama seksyen 34 Kanun Keseksaan.

[2] At the end of the prosecution's case, the learned trial judge ruled that a *prima facie* case of direct trafficking by an overt act of 'selling' as provided under s. 2 of the DDA had been proven against the appellants.

[3] The appellants gave sworn evidence and called two other witnesses. At the end of the defence's case, the learned trial judge found that the defence had failed to raise any reasonable doubt against the prosecution's case and thus, the appellants were convicted as charged and accordingly sentenced to death.

[4] Their appeals came up for hearing before us on 18 January 2018. We allowed their appeals, set aside the convictions and sentences handed down by the learned trial judge and consequently acquitted all the three appellants of the charge.

[5] For the purpose of this judgment, we will only narrate the facts and issues considered to be relevant and essential to our decision and will also refer to the appellants as they were referred to before the High Court.

The Case For The Prosecution

[6] This is a case of an entrapment carried out by police agent provocateurs acting as drug buyers. The entrapment was conducted based entirely on information obtained by SP5 (Detektif Lans Koperal Rosyaidi

bin Anuar) from his informer whose identity remained unknown during the trial. On 22 January 2014, SP5 was informed by the informer that a drug transaction involving the purchase of 5000 'ecstasy pills' at the price RM87,500.00 had been arranged. SP5 was told by the informer to meet the seller, a Chinese man, in front of Kelab Connought at Taman Bukit Cheras, Kuala Lumpur. SP5 conveyed the information to his superior, SP-4 (Asisten Superintenden Polis Mohd Ashril bin Md Johar), who then instructed SP5 and SP7 (Detektif Koperal Bahar bin Sukarman) to act as the buyers and to proceed with the transaction according to the arrangement made by the informer.

[7] SP5 and SP7 went to the meeting place in a white Toyota Estima car bearing registration number WXC 6662 driven by SP5. By the time they reached the place at about 8.30pm, SP4 and members of his team were already there, taking their ambush position. After waiting in the car for about 15 minutes, OKT3 (Ooi Teck Voon/the third appellant) came and entered the car. He requested to see the money but SP5 demanded to see the 'ecstasy pills' first. OKT3 left the car and came back later with OKT1 (Heng Poh Kean/the first appellant). Both of them then entered the car. OKT1 sat at the front passenger seat besides SP5 and OKT3 sat at the back with SP7. OKT1 thereafter demanded to see the money. SP5 duly gave him the money. OKT1 counted the money and made a phone call after the counting of the money was completed. OKT2 (Ng Seng Siong/the second appellant) came to the car not long after OKT1 made the phone call, carrying with him a plastic package. He passed the package to OKT3 who in turn passed it to OKT1. OKT1 opened the plastic package, revealing the 'ecstasy pills'. Thereupon, SP5 gave the ambush signal by flashing on the car's light and the ambush team led by SP4 sprang into action. OKT2 tried to flee the scene but was apprehended about 20 meters away from the car. Meanwhile, both OKT1 and OKT3 were detained while still inside the car. The plastic package containing a total of 5000 'ecstasy pills' was seized from OKT1.

[8] The 'ecstasy pills' were analysed by the chemist, SP3 (Suhana binti Ismail), and was found to contain a total of 540.3g of 3, 4 – Methylenedioxymethamphetamine (MDMA), a drug listed under the First Schedule of the DDA, which form the basis of the charge against all the appellants ('the said drugs').

The Appeals

[9] There were several grounds of appeal raised by learned counsel for the appellants through their respective petition of appeals and written submissions, including the failure by the learned trial judge to make a specific finding of possession; discrepancies in the identification of the said drugs; the role played by each appellants during the transaction; and the failure by the

learned trial judge to appreciate the defence. At the end of the day, we opined that the grounds, essential to our decision, were confined to only the following:

(i) role of the informer; and

(ii) doubt in the identity of the drugs.

Role Of The Informer

[10] The law relating to an informer is settled. Under s. 40 of the DDA, the identity of an informer is protected from disclosure in any legal proceedings, which necessarily includes protection from being identified and called to testify in a criminal trial.

[11] However, it was submitted before us by learned counsel for the second appellant and adopted by counsels for the first and third appellants, that the informer in this case had assumed the role or mantle of an agent provocateur. Therefore, it was argued that the identity of the informer lost its protection under the law. The informer in fact has metamorphosed into an essential witness for the prosecution and the failure on the part of the prosecution to call the informer to testify had seriously compromised its case, warranting the adverse inference under s. 114 illustration (g) of the Evidence Act 1950, against the prosecution to be invoked.

[12] In support of his submission, learned counsel relied on the judgment of the Federal Court in *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17; where it was held that:

> [16] From the decision of the above cited cases, the position in law in relation to ss. 40 and 40A of the Act is well settled and clear. The informer is protected from giving evidence whilst an agent provocateur is not protected. In other words, if a person is only an informer, the prosecution is not required to call him as a witness or offering him to the defence. An informer is protected under s. 40 of the Act. On the other hand if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is not called he has to be offered and made available to the defence. Failure to comply with this requirement will attract the application of adverse inference under s. 114(g) of the Evidence Act against the prosecution's case.

[13] The guiding principle regarding the issue can further be found in the Federal Court case of *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1; in which it was laid down as follows:

> Having said that, it is in our view clear law, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see eg, *Adel Muhammed el Dabbah v. AG (Palestine)* [1994] AC 156 at 167-9) the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary

witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less than a statutory duty – the accused must be acquitted.

In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur, for it was he, who had put the appellant in touch with the undercover agent Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s. 40 of the Act.

In these circumstances, he came within the category of witnesses, described by Lord Roche in *Seneviratne*, as "witnesses essential to the unfolding of the narratives on which the prosecution case is based." The same might be said of the informer's friend. Yet, neither the so called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial Judge for these glaring omissions.

We hasten to add, that in a case such as the present, where it was never suggested by the prosecution that either of these individuals was not capable of belief, it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case.

In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence or in default to have explained why they were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Moreover, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, "the prosecutor will ensure that the accused is given the opportunity to call the witness". (Per the High Court of Australia in *Richardson, ibid*).

[14] The pertinent question thus is whether the informer in this case had in fact assumed the mantle of an agent provocateur and hence became "witnesses essential to the unfolding of the narratives on which the prosecution case is based"?

[15] It is thus crucial to scrutinise the evidence regarding the involvement of the informer in the whole transaction, which we thought the learned trial judge had failed to do. SP5 in cross-examination had given evidence as follows (at p. 95, appeal record, vol. 2):

Q: Tadi kamu kata, kamu tidak ada nombor telefon mana-mana OKT. Kamu kata Ah Man yang beritahu. Saya cadangkan sebenarnya bukan Man yang beritahu bawa wang RM87,500 untuk 5000 pil ini tetapi sumber kamu yang beritahu kamu?

A: Setuju.

Q: Setuju dengan saya sebelum tangkapan kamu hanya berurusan dengan sumber kamu sahaja?

A: Benar.

Q: Setuju dengan saya pada hari kejadian kamu datang untuk ambil barang dan bayar sahaja?

A: Benar.

[16] Further, the investigating officer, SP8 (Inspektor Kumbat anak Tan), in cross-examination, had testified as follows (at p. 163, appeal record, vol. 2):

Q: Setuju dengan saya, rekod-rekod panggilan keluar masuk ini adalah penting dan membantu siasatan kamu?

A: Saya kurang setuju.

Q: Yang mana kurang setuju? Boleh terangkan?

A: Sebab daripada siasatan saya ketiga-tiga OKT tidak pernah berhubung secara direct dengan kedua-dua AP.

[17] However, the learned trial judge found that SP5's informer did not play an active role and was not at the scene of the crime and the said informer was thus protected under s. 40 of the DDA 1952. Hence, the failure to call the said informer is no ground to invoke the adverse presumption under s. 114, illustration (g) of the Evidence Act 1950. The learned trial judge stated, at pp. 40-41, appeal record, vol. 1:

[58] Selain itu, peguam OKT2 berhujah bahawa kegagalan pihak pendakwaan memanggil 'sumber' SP5 untuk memberi keterangan telah membangkitkan inferen yang bertentangan di bawah seksyen 114(g) ini.

[59] Undang-undang adalah jelas bahawa sama ada seseorang itu adalah seorang 'sumber' atau ajen perangkap adalah bergantung kepada fakta sesuatu kes. Ini dijelaskan dalam kes *Public Prosecutor v. Mansor Md. Rashid & Anor (supra)* di muka surat 253 seperti berikut:

> Before us it was submitted for the respondents that Cholar as an informer had turned into as agent provocateur. *Namsiyiam and Others v. PP* [1987] 2 MLJ 337 was cited in support.
>
> The Act does not define 'informer' and 'agent provocateur'. But the distinction is recognised. (See s. 40 and 40A of the act).
>
> In *Munusamy v. PP* [1987] 1 MLJ 492 Mohd. Azmi SCJ in delivering the judgment of the Court opined that 'whether a person is an informer or has become as active agent provocateur would depend on the facts of each particular case.

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> [60] Kembali kepada fakta kes ini, sumber kepada SP5 tidak memainkan peranan aktif dan tidak berada di tempat kejadian. Oleh itu perlindungan kepada 'sumber' di bawah seksyen 40 ADB 1952 adalah terpakai. (emphasis added)
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> [61] Sehubungan itu juga, tindakan pihak pendakwaan tidak memanggil 'sumber' tersebut untuk memberi keterangan tidak dibangkitkan inferen yang bertentangan kepada kes pendakwaan di bawah seksyen 114(g).

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[18] Learned counsel for the second appellant submitted that the learned trial judge, in making the aforesaid finding that the informer did not play an active role based upon the fact that the informer was not present during the sale transaction, had committed a grave error by taking a too simplistic approach of the issue.

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[19] With due respect, we agreed with learned counsel that the learned trial judge had erred in finding that the informer had played no active role in the sale transaction. Though the informer was not present during the transaction, apparently, the purchase price, the amount of drugs, the time and place of the transaction, were all determined by the informer and conveyed to SP5. Further, SP8 confirmed that there was no direct communication in any form between SP5 or SP7 and any of the appellants prior to the transaction.

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[20] The Federal Court in *Wan Yurillhami bin Wan Yaacob & Anor v. Public Prosecutor (supra)* made a reference to the case of *Ti Chuee Hiang v. PP (supra)* and held that:

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> [20] As regards the case of *Ti Chuee Hiang v. PP (supra)* cited by the appellants to support their case that Seman is an agent provocateur, it can be discerned from the judgment of the case that before an informer becomes an agent provocateur and no longer enjoy the protection of s. 40 of the Act the following conditions must be satisfied:
>
> (i) he holds the key to the unfolding of events, without which there are gaps in the prosecution's case; and
>
> (ii) his role is the deciding factor in the sale transaction of the drugs.

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[21] Based on the facts and circumstances of this case, we were of the considered view that the informer had played a significant role in the sale transaction and should be considered as a person who held "the key to the unfolding of events, without which there are gaps in the prosecution's case" and played the "deciding factor in the sale transaction of the drugs".

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[22] Clearly, the evidence revealed that it was the informer who had actually communicated with the seller and determined the price and amount of the 'ecstasy pills' and the time and place of the sale transaction that is to take place and had it conveyed to SP5. SP5 then conveyed the information to SP4 who made the decision to proceed with the sale transaction that finally resulted in the arrest of the appellants. SP8 confirmed that there was never a direct communication between SP5 and SP7 with any of the appellants.

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[23] In such circumstances, we were strongly of the view that the informer had assumed the mantle or role of an agent provocateur and thus had become an essential witness for the unfolding of the full narrative of the prosecution's case, without which, there was a serious gap in the prosecution's case.

[24] As regards to the application of an adverse presumption under s. 114, illustration (g), of the Evidence Act, we were of the view that based on the facts and evidence, the prosecution shall not be adjudged to have deliberately made an attempt to suppress the evidence of the informer simply by its failure to call or offer the informer as a witness. Thus, the adverse presumption under the said section shall not apply against the prosecution.

[25] Nevertheless, the failure by the prosecution to call the informer had created a material gap in its case and consequently, raised a reasonable doubt as to whether the appellants had knowledge that they were consciously and deliberately participating in a sale transaction of drugs, since all the matters and information regarding the sale transaction were obtained by SP-5 from the informer and there was never any direct communication between SP-5 and the appellants. Therefore, it could not be said that a *prima facie* case had been established against all the three appellants as charged and thus, the defence should not have been called by the learned trial judge.

Doubt in the identity of the drugs

[26] This issue was raised mainly in the light of the discrepancies between the evidence of the raiding and investigating officer (SP4 and SP8) and the evidence of the chemist (SP3) regarding the symbol appearing on 3,500 out of the total of 5,000 'ecstasy pills'.

[27] The evidence of SP4 and SP8 showed that the 'ecstasy pills' seized at the crime scene by SP4 and later handed over to SP-8 were in the following descriptions:

(i) 35 plastic packets, each containing 100 pink-coloured pills bearing "$" symbol;

(ii) 1 plastic packet containing 1000 yellow-coloured pills; and

(iii) 1 plastic packet containing 500 yellow-coloured pills.

[28] However, the evidence of SP3 showed that the 'ecstasy pills' received by her from SP8 were described as follows:

(i) 20 plastic packets, each containing 100 pink-coloured pills bearing "$" symbol;

(ii) 15 plastic packets, each containing 100 pink-coloured pills bearing "Crown" symbol;

(iii) 1 plastic packet containing 1000 yellow-coloured pills; and

(iv) 1 plastic packet containing 500 yellow-coloured pills.

[29] Apparently, the evidence of SP4 and SP8 showed that 3,500 of the pink-colored pills had "$" symbol embossed on them whereas the evidence of SP3 showed that out of the 3,500 pink-colored pills, 1,500 of them had a "Crown" symbol on them and not a "$" symbol.

[30] In his grounds of judgment at pp. 41-42, appeal record, vol. 1, the learned trial judge had considered the issue in the following terms:

> Isu identiti barang kes
>
> [62] Selain itu, pihak pembelaan juga mempertikaikan identiti barang kes dalam kes ini antara lain kerana terdapat perbezaan jumlah pil-pil yang berlogo 'S' menurut borang serah menyerah (P33) berbanding dengan laporan kimia (P27) yang mencatitkan juga pil-pil yang berlogo 'crown' yang tidak dicatitkan dalam 'P33'.
>
> [63] Berhubung perkara ini, berdasarkan P33, jumlah pil yang terlibat adalah sebanyak 5000 biji. Laporan Kimia (P27) juga mencatitkan jumlah pil adalah 5000 biji. SP4 yang merampas barang kes mengecam barang kes melalui penandaan dan tandatangan SP4. Rantaian keterangan berhubung dadah ini juga tidak terputus. Hanya kerana perbezaan jumlah pil bertanda 'S' dan 'crown' sahaja tidak menunjukkan ianya bukan dadah yang dirampas di tempat kejadian. (emphasis added)
>
> Berdasarkan huraian fakta di atas, saya dapati dadah yang dianalisa oleh ahli kimia iaitu SP3 adalah dadah yang sama yang dirampas di tempat kejadian pada 22.1.2014 berkenaan dan barang kes yang sama dibawa ke Mahkamah untuk perbicaraan. Selain itu rantaian keterangan berhubung dadah yang dirampas tersebut tidak terputus.

[31] In response of the said findings, learned counsel cited the Federal Court case of *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383, where the issue of the discrepancies in the description of the drugs in issue was determined as follows:

> [33] In the present case, there are two material discrepancies that is as to the number of 'ketulan' and as to the gross weight of the cannabis. Both these discrepancies were never explained by the prosecution, save to say that the charge referred to by learned counsel was the original charge, and the charge was later amended to read as trafficking in 799.4g of cannabis. It was further contended by the prosecution that since the amended charge is based on the net weight, therefore, any discrepancy in the gross weight is immaterial.
>
> [34] The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively identified the drug exhibit based

on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the drug exhibit.

[35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case.

[32] Apparently in the present case, there was no explanation provided by both SP4 and SP8 as to why there were discrepancies in the identification of those 3,500 pills. It involved a big amount of pills that were wrongly identified and thus, it is our view that in the absence of a reasonable explanation, the learned trial judge could not simply brush it aside as immaterial and of no consequence. Under the circumstances, the onus is on the prosecution to offer cogent explanation to rectify the discrepancies and the failure to do so would raise a reasonable doubt in the identity of the drugs.

The Conclusion

[33] Based on the reasons as stated above, we were of the view that the prosecution had failed to prove a *prima facie* case against all the three appellants and their defence should not have been called. We, therefore, allowed the appeal and set aside the convictions and sentences handed down by the learned trial judge. We further ordered that all the three appellants shall be acquitted forthwith and discharged of the charge against them.